Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1365

GEORGE E. HOUGH,
and
PEERLESS INSURANCE COMPANY,
by its Agent, VICTOR APODACA, JR.,
Petitioners,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The *Memorandum Opinion and Order* was entered by the District Court on April 5, 1978, (RI 93-98), and

reproduced herein as Appendix A. The *Order* denying Surety's Motion to Reconsider was entered by the District Court on April 28th, 1978, and reproduced herein as Appendix B. The unpublished opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 6, 1978; reported in table form as *United States v. Hough*, 586 F.2d 841 (1978); and reproduced herein as Appendix C.

JURISDICTION

The Judgment of the United States District Court was affirmed by the United States Court of Appeals for the Fifth Circuit on December 6, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. §1254, and under Article III. §2 of the United States Constitution.

QUESTIONS PRESENTED

Whether State Law or Federal Common Law governs the interpretation of federal bail bonds?

Whether a surety may be held liable on a bond contract which has been materially altered without notice or consent.

STATUTES AND RULES

No statute or rule appears to influence or govern the result in this case.

STATEMENT OF THE CASE

A. Course and Proceedings in the Courts Below:

This is an appeal by the Surety on a fifty thousand dollar bond forfeiture entered by the United States District Court for the Western District of Texas, El Paso Division.

George Elwell Hough, the Defendant and Principal on the instant bail bond contract, failed to appear to begin serving his sentence on December 20, 1977, after his conviction and sentence was affirmed on appeal, (RI 87-88). Subsequently, on January 3, 1978, the United States moved for Judgment on Forfeiture of Bail, (RI 61-63). Pursuant to this, the District Court entered a *Declaration of Forfeiture of Bail and Order for Service of Copy of Motion for Judgment on Bond Forfeiture*, on January 21st and January 24th, 1978, respectively, (RI 64-65). The Surety, Peerless Insurance Company through its agent Victor Apodaca, Jr., filed its answer on February 10th, 1978, supported by a *Memorandum Brief*, (RI 66-73). To this pleading, the United States filed responses on March 8th, 1978, (RI 74-75), and on March 15, 1978, (RI 76-79), to which the Surety made a further response on March 20th, 1978 (RI 80-82). In summary, the Surety argued in its various responses that the bail bond contract was void against Surety because it was materially altered, (RI 67, 70, 72).

The District Court on April 5, 1978 filed a *Memorandum Opinion and Order*, (reproduced herein as Appendix A), which entered a Bond Forfeiture Judgment against Surety in the amount of Fifty Thousand Dollars ($50,000.00), (RI 93-98). The Surety filed a *Motion to Reconsider* on April 11, 1978, (RI 83-84). Pursuant to this Motion, the District Court held an evidentiary hearing on April 21, 1978, (RII 1-44). After the hearing, on April 28, 1978, the Court entered an *Order* denying the Surety's Motion to Reconsider, (RI 86), (reproduced herein as Appendix B), to which the Surety filed a timely *Notice of Appeal*, (RI 89). The United States Court of Appeals for the Fifth Circuit affirmed this *Order* in an unpublished Opinion, dated December 6th, 1978, (reproduced herein as Appendix C).

B. Statement of the Facts:

On May 10, 1976, George Elwell Hough, having been found guilty of a violation of 21 U.S.C. §841 (a) (1), was sentenced to twelve years confinement and twelve years special parole, (RI 50). On that same date a *Notice of Appeal* was filed by his attorney of record, (RI 51). Subsequent to this, on May 27, 1976, a Corporate Surety Appeal Bond of $50,000.00 was approved by United States Magistrate Jamie C. Boyd, (RI 53). The Bond was signed by George E. Hough and by Victor Apodaca, Jr., as agent for Peerless Insurance Company. Added to the Bond's form language was the proviso typed in capitals: "SPECIAL CONDITION: DEFENDANT WILL NOT BE PERMITTED TO LEAVE EL PASO COUNTY, TEXAS.," (RI 53). Mr. Apodaca,

agent for the Surety, testified that this condition was added through an agreement with himself and the United States Magistrate. Mr. Apodaca further testified that since he knew that the Defendant has been convicted and sentenced to twelve years, (RII 12), and that because this was an "Appeal Bond" Mr. Apodaca felt it was a high risk bond, (RII 12). Approximately one month later, on April 28th, 1976, the Defendant's attorney, Mr. Lee A. Chagra, filed a *Motion to Amend Provisions of Bond*, (RI 56-57). This *Motion* asked the Court to extend the limits of Mr. Hough's bond to "Ohio, Indiana, and Brownsville, Texas," (RI 56). An *Order* granting this *Motion* was filed by the United States Magistrate on the same day, (RI 58), although it was apparently granted earlier, on June 24, 1978, (RI 58). Mr. Apodaca, agent for the Surety, testified that he had not been notified of the change of the bond requirements, (RII 8-9). Mr. Chagra, Attorney for Mr. Hough, also testified that he gave no notice to Mr. Apodaca of the *Motion* or *Order* changing Mr. Hough's bond requirements, (RII 27-28).

As to the modification or alteration of the bond, Mr. Apodaca testified that because of the change in the bond requirements his risk under the bond was increased, (RII 17), and that his ability to perform his contractual obligation was adversely affected, (RII 10). Mr. Apodaca further testified that he would have demanded more "security" from the Defendant if he were allowed to leave El Paso, and asked for additional reporting requirements in the areas in which the Defendant was to travel, (RII 12).

Additionally, Mr. Apodaca stated that his ability to arrest or surrender the Defendant was jeopardized, (RII 12).

As to the procedure of the local Courts in regard to changes in bonds, Mr. Apodaca testified that he had had conditions and bonds modified before, (RII 21-22), but that he had been notified by the Court of the changes, (RII 22). He specifically testified to procedures utilized with the United States Magistrate Boyd:

> (by the Court)
> "Q. Has there been any other type of circumstance where you have been notified of a changed condition?
> A. Yes, sir. When Judge Boyd wanted to enter an order allowing someone to leave, he would notify my, and I would send a letter saying it would be all right with us.
> Q. All right. In other words —
> A. — permission.
> Q. — you used that procedure with Judge Boyd as the United States Magistrate in connection with changes of bonding conditions?
> A. Yes, sir.
> Q. All right.
> THE COURT: I have no further questions. Mr. Baker?"

Mr. Apodaca testified that he saw the Defendant, Mr. Hough, "a number of times" after the conditions of the bond were altered, (RII 19), pursuant to his reporting requirements. Mr. Chagra, Defense Attorney for

Mr. Hough, indicated that he first notified Mr. Apodaca that Mr. Hough was not in El Paso sometime after the mandate of the Fifth Circuit affirming the Defendant's conviction was issued and before the Defendant was to report to the United States Marshal's Office to begin his sentence, (RII 30-31, see also *Stipulation*, RI 87-88). Mr. Chagra testified that at that time Mr. Apodaca had been calling his office, (RII 30); that he was "angry" and "upset," (RII 33); and that Mr. Apodaca kept asking: "How come he's not here," (RII 33). Mr. Chagra indicated that this would have been the first time that he informed Mr. Apodaca of Mr. Hough's absence from El Paso County, (RII 34). Mr. Chagra testified that he did not recall ever advising Mr. Apodaca of his *Motion* or the *Order* changing the bond conditions, (RII 28). Subsequent to this notification, "George Elwell Hough failed to appear on or before December 20, 1977, and, to this date, he has failed to appear," (*Stipulation*, RI 87).

REASONS FOR GRANTING THE WRIT

I

The Court Of Appeals Erred In Upholding The District Court's Decision That Federal Common Law Controls Federal Bail Bond Contracts.

1. State Law.

In the Courts below the Petitioner cited Texas precedents in support of its contention that a material

alteration of a bail bond contract voided it as against a non-consenting surety, *Gragg v. State*, 18 Tex. App. 295 (1885); *Wagner v. State*, 13 S.W. 608 (Tex. Cr. App. 1890); *Gilford v. State*, 362 S.W. 2d 843 (Tex. Cr. App. 1962).

2. *Circuit Conflict.*

While the Fifth Circuit has gone on record as holding that federal common law controls federal bail bond contracts, *United States v. Miller*, 539 F.2d 445 (5th Cir. 1976). The Sixth Circuit in *United States v. D'Anna*, 487 F.2d 899 (6th Cir. 1973); and the Ninth Circuit in *United States v. Gonware*, 415 F.2d 82 (9th Cir. 1969), have held to the contrary, declaring that a federal bond contract "must be interpreted in light of the applicable law of the State in which it was made," *D'Anna, supra*, at 900.

One of the principle rationales for applying the limited doctrine of "Federal Common Law" is that of uniformity, or the "desirability of a uniform rule in plain," *Clearfield Trust Co. v. United States*, 318 U.S. 363, at p. 367, 63 S. Ct. 573, 87 L.Ed. 838 (1943). Here we gave no-uniformity on two levels, in both the choice of law ruled and the actual law applied. Thus, when the Fifth Circuit is applying federal law and the other circuits are applying the respective state laws we have less uniformity than a general rule to apply the applicable state law would create. Clearly, the conflict is a clarion's call for this Court's intervention into this long neglected area.

II

The Court Of Appeals Erred In Affirming The District Court's Decision That The Instant Bail Bond Contract Was Enforceable Against This Surety When Said Contract Had Been Materially Altered Without Notice Or Consent Of This Surety.

There is no conflict as the Petitioner's general premise, that a bail bond is simply a contract, *United States v. Gonware*, 415 F.2d 82 (9th Cir. 1969), which is to be construed strictly in favor of the surety who may not be held to any greater undertaking than he has agreed to, *United States v. Miller*, 539 F.2d 445 (5th Cir. 1976).

1. *Interpretation of the Bond.*

This cause revolves around the effect of a modification of a bail bond contract bearing the following proviso without the knowledge or the consent of the surety who initially executed it.

> "SPECIAL CONDITION: DEFENDANT WILL NOT BE PERMITTED TO LEAVE EL PASO COUNTY, TEXAS.;"

The rules governing the construction of contracts would clearly give precedence to this "Special Condition" as against the form language of the bond. First, as previously noted, the clause is typewritten and thus

prevails over printed language, especially form printing, *Bartlett & Co., Grain v. Susanna Plantation,* 219 F. Supp. 31 (D.C. La. 1963). Second, the clause is more specific than the general clauses. Thus, this "subsequent specification impliedly limits the meaning of a preceding generalization," *Friedrich v. Local No. 780 IUF-AFL-CIO-CLC,* 515 F.2d 225 (5th Cir. 1975); *G. T. Schjeldahl Co., Packing Machinery Division v. Local Lodge 1680, Dist. Lodge No. 64 of Intern. Ass'n of Machinists,* 393 F.2d 502 (1st Cir. 1968).

In summary, "effect is to be given to words inserted into the body of an existing form, even if to do so required a rejection of uncancelled provisions of the original draft," *N.L.R.B. v. Boyer Bros., Inc.,* 448 F.2d 555 (3rd Cir. 1971), citing *Marine Insurance Company v. M'Lanahan,* 290 F. 685 (4th Cir. 1923).

2. Materiality of the travel restrictions of the Bond.

The general rule on the materiality of any portion of a contract is that for the portion to be material, it must affect the rights and liabilities of the parties, *Gummed Tapes (PTY) Ltd. v. Miller,* 155 F. Supp. 267 (D.C. Pa. 1957); see generally 3 C.J.S. Alteration of Instruments §1-5. Here we have a form bond which was modified at its inception by agreement between the Surety and the United States Magistrate, (RII 7), to be more restrictive than its usual form. In other words, the form restricting the Defendant to the Western District of Texas was superceded by an all capitals, typewritten proviso

restricting the Defendant to El Paso County, Texas, (RI 53). Subsequently, without notice to Surety (RII 8-9, 27-28), the bond was modified to allow the Defendant greater freedom than the usual form, allowing him to travel to and from Indiana, Ohio, and Brownsville, Texas. This change allowed the Defendant to be anywhere in the two states and one city listed above and presumably on any reasonable travel path in between these points, (RI 56-58).

The Appellant contends that this was a material modification because it affected his rights and liabilities under the bail bond contract. This materiality almost goes without saying. If we were to imagine a host of criminal Defendants on bond, including some already convicted and sentenced, petitioning for wholesale expansions of their travel restrictions on the grounds that any expansion of travel restrictions would be immaterial to the risk of them fleeing, et cetera, we can readily imagine what the Government's or the Court's positions would be. But in this case, we do not have to rely on such speculation, since we have the testimony of the Surety's agent, Mr. Apodaca, to the effect that: (1) the change increased his risks, (RII 17); and (2) the change adversely affected his ability to perform his contractual obligations, (RII 10).

3. The effect of alteration of the bail bond contract without notice or consent of the surety.

In addition to the above, the Petitioner would show this Court that the "Federal Common Law" is also in

accord with its position, although not dealing specifically with bond forfeitures. In *United States v. Reinke,* 172 F. Supp. 131 (D.C. Mo. 1959), a situation similar to the instant case prevailed. A defense contractor executed a contract with the United States Air Force, and because of subsequent material alterations in the contract without the contractor's consent, the Court held that the contract was void as to the contractor, and that a note given by him as security was a "nullity," *Reinke, supra.,* at p. 140. See also: 4 Am. Jur. 2d §9, at p. 10; 3 C.J.S. Alteration of Instruments §5, at p. 9071.

Besides complaining of its lack of consent as to the material modification of the bond, surety also complained about its lack of notice as to the above described modification, (RI 66-67, 70). In support of this undenied lack of notification, the United States and the District Court cited *Stuyvesant Insurance Co. v. United States,* 410 F.2d 524 (8th Cir. 1969), (RI 96), and *United States v. Caro,* 56 FRD 16 (S.D. Fla. 1972), (RI 96), among others.

The Petitioner surety would argue to this Court that the rule of *Caro,* et cetera, to the effect that notice to the Defendant is considered "imputed" notice to the surety, is an unsound rule and fundamentally unfair. The reason for this is simple. The interests of a Defendant and a surety are not the same, and indeed sometimes are diametrically opposed. Consider the instant case, which involves expanded travel restrictions. The agent for surety, Mr. Apodaca, testified that he had known

about the vastly increased travel limits, he probably would have asked for more "security" or collateral from the Defendant, (RII 12). That sort of action on the part of a surety, given the higher risks, (RII 17), is reasonable if not predictable. What is not reasonable is finding that notice of a favorable bond change to a Defendant is imputed knowledge to a surety, to whom the same change would be unfavorable (as to his risks). Surely this rule violates our sense of fairness, not to say our common sense.

In summary, the Petitioner contends that the material alteration of its bail bond contract, without actual notice or consent, voids the contract, thus relieving surety of liability as to the forfeiture. The above result is especially applicable in this case because of the added "Special Condition" which was discarded under the modification. A contrary result or a contrary rule would be onerous. It would virtually prevent bondsmen from bargaining or affecting the terms of the bond in any way, because any restriction they could add to the bond could be summarily swept away without their consent or knowledge. If bail bonds are truly contracts, and bondsmen truly contractors, then such a condition cannot be allowed to continue.

CONCLUSION AND PRAYER

The Petitioner would begin this Conclusion to his Petition by stating that although criminal bondsmen are generally not highly regarded, they do contribute a

valuable service to this country. They provide liberty to those accused of crime, although admittedly for a price. Since the passage of the Judiciary Act of 1789, there has been a right to freedom under bail in our country. This right has been closely connected to three other rights of Constitutional magnitude, including: (1) the right to prepare a defense; (2) the right against punishment before conviction, and (3) the right to a presumption of innocence, *Stack v. Boyle*, 342 U.S. 1, 72 S. Ct. 1, 96 L.Ed. 3 (1951). Our defense contractors provide armaments to defend our country, for a price. Our criminal bondsmen help us to protect the values, listed above also for a price. It is time that we begin to treat them equally with others in other occupations who bargain and contract with the Government.

The need for this Court to speak in this area should be obvious. The need for rules is equally obvious. In this regard, the Petitioner would urge the following rules upon this Court. First, sureties should be actually notified of significant changes on alterations in their bail bond contracts. Second, as the Second Circuit advised in *United States v. Egan*, 394 F.2d 262 (2nd Cir. 1968).

> Regardless of who the movant may be, if the court orders a material modification of the terms of the bond, the defendant must immediately post a new, properly executed bond, or a rider similarly executed for attachment to the old bond, containing the amended conditions. If such an instrument is not filed forthwith, the court must order the defendant held in the custody of the Attorney General until such a bond is furnished.

Egan, at p. 267-268.

Such changes would not warp our federal bail bond system, but merely bring it into line with similar Government contracts and our idea of equal treatment under law.

Wherefore, for the reasons stated above as well as those stated in the body of this Petition, the Petitioner prays that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOSEPH (SIB) ABRAHAM, JR.

CHARLES LOUIS ROBERTS

CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner, Peerless Insurance Company by its Agent, Victor Apodaca, Jr., hereby certifies as follows:

(a) that I am a member of the bar of the United States Supreme Court, and that I have duly served all

parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:

(b) that the name and address of the attorneys of record for the adverse party are as follows:

> Jamie Boyd, United States Attorney, U.S. Attorney's Office, 655 E. Durango Blvd., Hemisfair Plaza, San Antonio, Texas 78206; and Honorable Wade H. McCree, Jr., Solicitor General, Department of Justice, Room 5612, Washington, D.C., attorneys for Respondent, United States of America;

(c) that on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said Jamie Boyd, and the said Wade H. McCree, Jr., attorneys for said Respondent, by depositing same in the United States post office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said address.

EXECUTED this 5th day of March, 1979.

JOSEPH (SIB) ABRAHAM, JR.

CHARLES LOUIS ROBERTS

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA

versus No. EP-75-CR-486

GEORGE E. HOUGH

MEMORANDUM OPINION AND ORDER

This cause is presently before this Court upon the Motion of Defendant-Surety, PEERLESS INSURANCE COMPANY, by its Agent, Victor Apodaca, Jr., to set aside forfeiture of bail herein. PEERLESS INSURANCE COMPANY is Surety for Defendant, GEORGE E. HOUGH'S, $50,000.00 appearance bond filed in this cause on May 27, 1976.

The above-styled and numbered cause was affirmed by the Fifth Circuit Court of Appeals on October 19, 1977; thereafter, the Defendant failed to surrender himself as ordered by the mandate of the Fifth Circuit Court of Appeals. On January 3, 1978, the United States of America filed its Motion for Judgment on Forfeiture of Bail, based upon Defendant's failure to surrender himself.

This Court entered its Declaration of Forfeiture of Bail on January 21, 1978, finding the Defendant-Principal, GEORGE E. HOUGH, to be in default and his bond to be forfeited. On February 10, 1978, the Defendant-Surety, PEERLESS INSURANCE COMPANY, filed its Motion to Set Aside Forfeiture of Bail pursuant to Rule 46 of the Federal Rules of Criminal Procedure.

I.

Rule 46(e) of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> "(e) Forfeiture.
>
> (1) Declaration. If there is a breach of condition of a bond, the District Court shall declare a forfeiture of bail.
>
> (2) Setting Aside. The Court may direct that a forfeiture be set aside, upon such conditions as the Court may impose, if it appears that justice does not require the enforcement of the forfeiture . . . ."

Defendant-Surety bases its Motion upon the fact that the appearance bond for the Defendant-Principal was executed on May 27, 1976, and specifically provided, as a special condition, that "Defendant will not be permitted to leave El Paso County, Texas. Subsequent to the execution of the appearance bond, the Defendant filed a Motion to Amend the Provisions of his

Bond to allow him to travel to Ohio, Indiana and Brownsville, Texas. Defendant-Surety contends that it was not served with a copy of said Motion, which was filed on June 24, 1976, and it was not offered the opportunity to appear and raise any objections to the Defendant's Motion to Amend.

On June 24, 1976, an Order was entered permitting the Defendant's bond to be amended as requested. Therefore, Defendant-Surety contends that it should not now be held liable on said bond forfeiture because the original bail bond, being a contractual obligation, subject to the rights, powers and limitations on its face, and thereafter being altered without its knowledge or consent, is null and void.

In response, the United States of America contends that the issue herein is not whether Defendant-Surety was notified of the amendment of the bond, but rather, that Defendant has breached a condition of that bond by failing to surrender himself to serve his sentence after the Fifth Circuit affirmed his conviction. The United States of America relies upon three cases in support of its contention that the bond herein should be forfeited. *See Stuyvesant Ins. Co. v. United States*, 410 F.2d 524 (8th Cir. 1969); *United States v. Egan*, 394 F.2d 262 (2nd Cir. 1968); *United States v. Miller*, 539 F.2d 445 (5th Cir. 1976).

II.

Defendant contends that the Court should apply the law of Texas in deciding whether the Surety should be

liable herein. The Court finds that this contention is incorrect, and that the applicable law is as set forth in *United States v. Miller, supra.* In *Miller,* the Fifth Circuit Court of Appeals held that "the interpretation of bail contracts to which the Government is a party is and should be controlled by federal common law." *Id.* at 447, n.2.

III

An appearance bond is nothing more than a contract between the Government on one hand and a principal and his surety on the other. The extent of the undertaking of the surety depends upon the wording of the agreement as interpreted within the framework of general federal principles of suretyship and contract law. As a general rule, the terms of a bail contract should be construed strictly in favor of the surety, who may not be held liable for any greater undertaking than he has agreed to, but, like any other contract, a bail bond should be construed to give effect to the reasonable intentions of the parties. *Id.*

The appearance bond in question here states the following: ". . . the Defendant is not to depart the Western District of Texas . . . except in accordance with such orders or warrants as may be issued by the Magistrate or the United States District Court for the Western District of Texas . . . ." The Court finds the argument of the United States of America is well taken, in that the "except" clause does expressly give the Court power to change the area in which the Defendant is allowed to travel without notice to the Surety.

This clause expressly reserves to the Court power to enlarge the area in which the principal of the bond may travel. PEERLESS INSURANCE COMPANY, and a compensated surety, accepted the onerous conditions of assuring a criminal defendant's appearance for trial and should anticipate the enlargement of travel restrictions in accordance with the terms of the bond. The Surety need not be notified everytime the principal is to appear in Court, but instead should keep itself posted on when the principal is to appear in order to keep itself informed of any changes made by the Court in accordance with the terms and purpose of the bond. *See Stuyvesant Ins. Co. v. United States, supra* at 526-27.

Furthermore, as the Eighth Circuit Court of Appeals held in *Stuyvesant,* "where the enlargement of travel area does not place the principal beyond the bounds of the United States, the surety should be responsible for the appearance of the principal, and it has the power of arrest without warrant in carrying out its obligations to produce the principal." *Id.* at 527.

IV

The test under Rule 46 of the Federal Rules of Criminal Procedures for setting aside a forfeiture of bond after a judgment of default is whether "justice does not require the enforcement of the forfeiture." This Court is firmly convinced that there is no reason whatsoever to relieve the Surety of the obligation which it undertook through the execution of this bond . . . The amendment of the bond conditions was made in com-

pliance with the express conditions of the bond, and the bond does not provide for notice to the Surety as to any orders entered by this Court, and it is the opinion of this Court that notice to the Defendant constituted imputed notice to Surety as to all matters in this cause. *See United States v. Caro,* 56 FRD 16 (S.D.Fla. 1972).

The express conditions of the bond herein state that ". . . if the Defendant fails to obey or perform any of these conditions, *payment of the amount of this bond shall be due forthwith.* Forfeiture of this bond for any breach of its condition may be declared by any United States District Court having cognizance (thereof) at the time of such breach and if the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in such . . . court against each debtor jointly and severally for the amount above stated, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States. (Emphasis added)." Defendant HOUGH has breached a condition of his bond by failing to appear to serve his sentence in accordance with the mandate of the Fifth Circuit Court of Appeals. Thus, as was held in *United States v. Foster,* 417 F.2d 1254 (7th Cir. 1969), upon the failure of a bailed defendant to appear in Court when he is required to do so, the surety upon his bond becomes absolutely obligated to the United States for the full amount of the bond.

It appearing to the Court that the Motion of Defendant-Surety, PEERLESS INSURANCE COMPANY, to set aside forfeiture of bail herein should be denied,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

(1) The Declaration of Forfeiture of Bail rendered by this Court on January 21, 1978, is hereby approved and confirmed;

(2) A Default Final Judgment is hereby entered against the Defendant-Surety, PEERLESS INSURANCE COMPANY:

(3) The Government shall recover of and from the Defendant-Surety Company, PEERLESS INSURANCE COMPANY, and/or its agent, VICTOR APODACA, JR., the principal sum of $50,000.00 together with interest at the rate of nine (9%) percent per annum thereon from this date forward and the costs of this proceeding, which shall be taxed for the Government and against the Surety Company, for which said sums let execution issue.

/s/ William S. Sessions
WILLIAM S. SESSIONS
United States District
Judge

April 5, 1978

Filed 4-5-78
Dan W. Benedict Clerk
By: G.J.S.
Deputy

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

UNITED STATES OF AMERICA

versus No. EP-75-CR-486

GEORGE E. HOUGH

ORDER

On this date came on to be considered the Motion of Defendant-Surety, PEERLESS INSURANCE COMPANY, by its agent, VICTOR APODACA, JR., to reconsider this Court's Memorandum Opinion and Order rendered on April 5, 1978, as well as the response of the United States of America to said Motion to Reconsider.

The Court, having held an evidentiary hearing on said Motion to Reconsider on April 21, 1978 is of the opinion that this Court's Memorandum Opinion and Order of April 5, 1978, was correct. Defendant-Surety's witness, VICTOR APODACA, JR., testified that he had had numerous contacts with the Defendant, GEORGE HOUGH, after the amendment of the appeal bond on June 28, 1976. Mr. Apodaca further testified that he had had numerous contacts with counsel for the Defendant, LEE A. CHAGRA.

It appearing to the Court that there were numerous occasions at which Defendant-Surety could have apprised itself of the amendment of the bond between June 28, 1976 and the issuance of the mandate by the Fifth Circuit on October 17, 1977,

IT IS THEREFORE ORDERED that the Motion of the Defendant-Surety, PEERLESS INSURANCE COMPANY, to reconsider this Court's Memorandum Opinion and Order of April 5, 1978 be, and it is in all things DENIED.

/s/ William S. Sessions
WILLIAM S. SESSIONS
United States District
Judge

April 28, 1978

Filed _____
Dan W. Benedict, Clerk

/s/ G.J.S.
Deputy

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-2094

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

GEORGE E. HOUGH,
Defendant,

PEERLESS INSURANCE COMPANY,
by its Agent, VICTOR APODACA, JR.,
Movant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(December 6, 1978)

Before THORNBERRY, AINSWORTH, and MORGAN, Circuit Judges.

PER CURIAM:

AFFIRMED on the basis of the memorandum opinion and order of the District Court dated April 5, 1978, and the District Court's order on the motion to reconsider dated April 28, 1978.

(Stamped: Do Not Publish)

APPENDIX D

SUMMARY IN ACCORDANCE WITH
RULE 23(f)

In accordance with this Court's Rule 23(f), the following points of error are presented. A federal question was raised at each judicial level below in a timely and proper fashion.

1. The following arguments were raised before the District Court.

A. That Texas Law applied to federal bail bond contracts. (RI 63-73).

B. That the bail bond contract was void as against the surety because surety had been materially altered without consent. (RI 67, 71-73, 83).

C. That the bail bond contract was void as against the surety because had not been given notice as to the modification. (RI 67, 70, 72).

2. The following points of error were raised in the Petitioner's appeal to the United States Court of Appeals for the Fifth Circuit:

POINTS OF ERROR

I

THE DISTRICT COURT ERRED IN HOLDING THAT THE INSTANT BAIL BOND CONTRACT WAS ENFORCEABLE AGAINST THE SURETY WHEN SAID CONTRACT HAD BEEN MATERIALLY ALTERED WITHOUT THE CONSENT OR KNOWLEDGE OF THE SURETY.

II

THE DISTRICT COURT ERRED IN HOLDING THAT A MATERIAL MODIFICATION OR ALTERATION OF A BAIL BOND CONTRACT DID NOT REQUIRE ACTUAL NOTICE UPON THE SURETY.

In addition, under the first point of error, *supra*. The Petitioner argued that Texas Law should apply, *Brief for Appellant*, at pp. 11-12.

Supreme Court, U.S.
FILED
MAY 3 1979
MICHAEL RODAK, JR., CLERK

No. 78-1365

In the Supreme Court of the United States

OCTOBER TERM, 1978

GEORGE E. HOUGH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1365

GEORGE E. HOUGH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, Peerless Insurance Co., a surety, contends that a magistrate's relaxation of travel restrictions in a defendant's bond without notice to the surety constituted a unilateral material modification of the bond, thereby relieving the surety of any contractual liability following a forfeiture.

On October 7, 1975, George E. Hough, a nominal petitioner in this case, pleaded guilty to attempting to possess cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to 12 years' imprisonment to be followed by 12 years' special parole. The court of appeals affirmed on October 19, 1977 (Pet. 4; Pet. App. 1a).

The evidence, as set forth in the district court's memorandum opinion denying the motion of petitioner Peerless Insurance Company to set aside forfeiture of

bail, and the district court's order denying Peerless' motion for reconsideration, shows that after petitioner Hough's conviction, he was allowed to remain free on bond pending appeal. The bond was executed on May 27, 1976, in the amount of $50,000, and it was signed by Victor Apodaca, Jr., as agent for Peerless. It contained a provision that "the [d]efendant is not to depart the Western District of Texas * * * except in accordance with such orders or warrants as may be issued by the [m]agistrate * * *"; it also specifically provided that "[d]efendant will not be permitted to leave El Paso County, Texas" (Pet. App. 1a-4a).

Subsequent to the execution of the appearance bond, Hough filed a motion to amend the provisions of his bond to allow him to travel to Ohio, Indiana, and Brownsville, Texas (*id.* at 2a-3a). On June 24, 1976, the United States Magistrate entered an order permitting Hough's bond to be amended as requested (*id.* at 3a). No notice of this change was given to Apodaca; however, he had numerous contacts with Hough and his counsel after the amendment of the bond (*id.* at 9a).

Following the affirmance of his underlying conviction, Hough failed to surrender himself on December 20, 1977, as ordered by the mandate of the Fifth Circuit Court of Appeals (Pet. 3; Pet. App. 1a). Thereafter, on January 3, 1978, the government filed a motion for judgment on forfeiture of bail, based upon Hough's failure to surrender himself (Pet. App. 1a). The district court entered a declaration of forfeiture of bail on January 21, 1978, finding Hough to be in default and his bond to be forfeited (*id.* at 2a). On February 10, 1978, Peerless, as surety, filed a motion to set aside forfeiture of bail, pursuant to Rule 46 of the Federal Rules of Criminal Procedure. The district court denied Peerless's motion (*id.* at 1a-7a) and,

following an evidentiary hearing, denied Peerless's subsequent motion to reconsider (*id.* at 8a-9a). The court of appeals affirmed (*id.* at 10a-11a).

1. Peerless contends (Pet. 9-13) that the magistrate's enlargement of the travel restrictions of Hough's bond to allow him to leave El Paso County in the Western District of Texas without notice to Peerless constituted a unilateral material modification of the bond and that therefore Peerless was relieved of any contractual liability for a forfeiture.

The argument falls with its premise. The bond expressly provided that "the [d]efendant is not to depart the Western District of Texas * * * except in accordance with such orders or warrants as may be issued by the Magistrate or the United States District Court for the Western District of Texas * * *" (Pet. App. 4a), and Peerless does not contend that the bond expressly provided for notice to it of any such orders. Because the bond expressly empowered the court or a magistrate to modify travel restrictions, Peerless, as the district court observed, could be expected to " 'anticipate the enlargement of travel restrictions in accordance with the terms of the bond' " (*id.* at. 5a, quoting *Stuyvesant Insurance Co.* v. *United States,* 410 F. 2d 524, 526 (8th Cir. 1969)). See also *United States* v. *Caro,* 56 F.R.D. 16, 18-19 (S.D. Fla. 1972). In the absence of a contractual entitlement to notice of motions or orders respecting Hough's bond, Peerless was properly deemed responsible for keeping itself posted on such matters. Pet. App. 5a; *Stuyvesant Insurance Co.* v. *United States, supra,* 410 F. 2d at 526-527. Accord, *United States* v. *Caro, supra.* Since, as noted above, the Peerless agent had numerous contacts with Hough and his counsel after the travel restrictions had been modified, he had ample opportunity to learn of the modification.

2. Peerless also contends (Pet. 7-8) that the courts below erred in applying federal law rather than state law in determining its rights under the bail bond and that certiorari is warranted to permit this Court to resolve a conflict in the circuits on the choice-of-law question. As evidence of the conflict, Peerless cites (*id.* at 8) cases from two circuits declaring that state law governs questions of bail bond contract interpretation, and cases from two other circuits holding that federal law applies. It is not clear, however, that these cases represent a conflict likely to persist in the absence of resolution of the issue by this Court or one that has produced intolerable results. In any event, it is unlikely that the conflict could be resolved in this case.

The most recent cases on this issue have held that federal law governs the interpretation of bail bond contracts. *United States* v. *Catino*, 562 F. 2d 1, 2-3 (2d Cir. 1977); *United States* v. *Miller*, 539 F. 2d 445, 447-448 (5th Cir. 1976). Of the two cases cited by Peerless as holding state law applicable, one has been characterized by a subsequent decision in the same circuit as representing dictum rather than a holding on the choice-of-law question (see *United States* v. *Vera-Estrada*, 577 F. 2d 598, 599 (9th Cir. 1978), discussing *United States* v. *Gonware*, 415 F. 2d 82, 83 (9th Cir. 1969)).[1] The other, *United States* v. *D'Anna*, 487 F. 2d 899, 900 (6th Cir. 1973), relies, without analysis, upon cases that decided the issue under former 18 U.S.C. 591 (repealed 62 Stat. 862), which contained language suggesting that state law governed questions concerning bail.[2] Such matters are now governed by the Bail

[1]The *Vera-Estrada* court, however, found it unnecessary to decide the question. The issue has also expressly been left open by the Tenth Circuit. See *United States* v. *Marquez*, 564 F. 2d 379, 380 (1977).

[2]See *Heine* v. *United States*, 135 F. 2d 914 (6th Cir. 1943); and *Palermo* v. *United States*, 61 F. 2d 138 (8th Cir. 1932), cert. denied, 288 U.S. 600 (1933). A third case relied on by the Sixth

Reform Act of 1966, 18 U.S.C. 3141 *et seq.*, Fed. R. Crim. P. 46(e)-(f), and 18 U.S.C. 3041, none of which contains such language. See *United States* v. *Miller*, *supra*, 539 F. 2d at 447 n.2. It is entirely possible that the Sixth Circuit would follow the recent decisions in *Miller*, *supra*, and *Catino*, *supra*, were the issue now presented to it.[3] Even assuming the Sixth Circuit adheres to its rule, however, Peerless has not adequately explained the practical necessity for resolving the conflict. Acceptance of the position urged by Peerless—that state law governs the interpretation of bail bond contracts respecting federal prisoners—would result in even less uniformity in the applicable law than is the case when at least two circuits are applying federal common law.

In any event the choice-of-law question is not presented in this case because Peerless has not shown that a different result would be dictated by Texas law. Peerless has cited three Texas cases for the proposition that "alteration of a bail bond contract void[s] it as against a non-consenting surety" (Pet. 8). None of the cited cases, however, involved a contract that expressly reserved the right of a court or magistrate to make changes in bond conditions; and one of the cases, to the extent it is relevant, tends to suggest that state law would lead to the result reached under federal law by the courts below. See *Gilford* v. *State*, 362 S.W. 2d

Circuit in *D'Anna*—*Swanson* v. *United States*, 224 F. 2d 795, 15 Alas. 608 (9th Cir. 1955)—was decided after the repeal of 18 U.S.C. 591, but the court there simply applied the territorial law of Alaska without discussion.

[3]It is similarly unclear whether the Eighth Circuit would continue to follow *Palermo* v. *United States*, *supra*, on this issue. The Eighth Circuit has not confronted the issue since the repeal of 18 U.S.C. 591 in 1948, although a recent district court decision in that circuit has accepted *Palermo* as controlling. *United States* v. *Wray*, 389 F. Supp. 1186, 1188 (W.D. Mo. 1975).

843, 844-845 (Tex. Cr. App. 1962) (where sureties admitted executing bonds with blank spaces for the insertion of certain information the "completion of the bail bonds by properly filling in such blank spaces with necessary and proper information is not an alteration of such bail bonds and the bonds are enforceable as so filled out").

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MAY 1979

DOJ-1979-05